No.

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1996

STATE OF WASHINGTON, CHRISTINE O. GREGOIRE,
Attorney General of Washington,
Petitioners,

v.

HAROLD GLUCKSBERG, M.D.,
ABIGAIL HALPERIN, M.D., THOMAS A. PRESTON, M.D.,
and PETER SHALIT, M.D., Ph.D.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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HOPE

QUESTIONS PRESENTED

1. Is there a constitutionally protected liberty interest under the Due Process Clause of the Fourteenth Amendment in committing suicide, and if so, does that interest include assistance in so doing?

2. If the answer to the foregoing question is in the affirmative, is a State statute that infringes on the protected liberty interest by prohibiting one person from assisting another to commit suicide nonetheless valid under the Due Process Clause because it furthers legitimate State interests?

3. Is there a rational basis for distinguishing between refusing life-sustaining medical treatment and requesting life-ending medical intervention, so that a State whose law allows the former but not the latter does not violate the Equal Protection Clause of the Fourteenth Amendment?

LIST OF PARTIES

The parties to the proceeding below were:

Petitioners: State of Washington and Christine O. Gregoire, Attorney General of Washington, both of whom were aligned as defendants/appellants below.

Respondents: Harold Glucksberg, M.D., Abigail Halperin, M.D., Thomas A. Preston, M.D., and Peter Shalit, M.D., Ph.D., all of whom were aligned as plaintiffs/respondents below. Three individuals identified only by pseudonyms were plaintiffs in the District Court below, but died during the pendency of the proceedings and are no longer parties to the litigation. A nonprofit corporation, Compassion in Dying, was a plaintiff in the District Court; however, its claims were not adjudicated by the District Court order that prompted this appeal and it is not a party to the appeal.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, filed March 6, 1996.

OPINIONS BELOW

The decision of the *en banc* panel of the United States Court of Appeals for the Ninth Circuit[1] is reported at 79 F.3d 790 (9th Cir. 1996). The Court's Amended Order[2] denying a request that the full court rehear the case *en banc*, with dissenting opinions, is reported at ___ F.3d ___ (1996 WL 315922) (9th Cir. 1996). The decision of the Ninth Circuit three judge panel[3] is reported at 49 F.3d 586 (9th Cir. 1995). The decision of the United States District Court for the Western District of Washington[4] is reported at 850 F. Supp. 1454 (W.D. Wash. 1994).

JURISDICTION

The Court of Appeals' opinion was filed and judgment entered on March 6, 1996.[5] The jurisdiction of

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[1] *Compassion in Dying* II, App. at A-1 to A-164. The copy of the opinion reflects changes pursuant to the *en banc* panel's order amending the opinion filed May 28, 1996. A copy of this order is found in the appendix at page B-1.

[2] *Compassion in Dying* I, App. at C-1 to C-26.

[3] App. at D-1 to D-27.

[4] App. at E-1 to E-29.

[5] App. at A-1.

this Court is invoked pursuant to 28 U.S.C. § 1254(1). By order of May 14, 1996, the time for filing an application for a writ of certiorari was extended to July 4, 1996.[6]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Fourteenth Amendment

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Declaratory Judgment Act, 28 U.S.C. § 2201

> (a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an

[6] App. at F-1 to F-2.

> appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
>
> (b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act.

Washington Revised Code § 9A.36.060

> (1) A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide.
>
> (2) Promoting a suicide attempt is a class C felony.

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 2201 and 42 U.S.C. § 1983. Eight plaintiffs—three patients, four physicians, and a nonprofit corporation—filed suit seeking a declaratory judgment that Washington's criminal statute prohibiting one person from aiding another person to commit suicide violates the Fourteenth Amendment of the United States Constitution. Plaintiffs also sought to enjoin enforcement of the statute.

1. The Statutory Scheme At Issue

Washington's statute prohibiting one person from assisting another person to commit suicide was initially adopted in 1854 by the first Territorial Legislature. The prohibition has remained in effect throughout the State's history, although the specific language of the statute has

varied with different codifications of the State's criminal code.[7]

The 1975 revision of the criminal code retained the prohibition against assisted suicide while at the same time removing criminal penalties from the act of attempting suicide.[8] The legislative committee whose comprehensive study led to the revision explained:

> "[W]hatever may be said of suicide itself, it seems clear that the introduction into the situation of another person who actively promotes the suicide could well increase the instability or irrationality of the potential suicide, affecting his judgment or emotional outlook. . . . Whatever the thoughts of a potential suicide may be, it is almost inconceivable that the threat of a two year prison sentence if he is unsuccessful in his attempt is going to deter his act. Moreover, it seems clear that such a person is in all probability a troubled, disturbed human being who need[s] psychiatric care or some other counseling service. His condition could only be aggravated by being branded a convicted felon and sent to [prison] for

[7] Copies of the various legislative enactments, including the statute currently in effect, are found in the appendix at pages G-1 to G-3.

[8] *See* Washington Laws of 1975, 1st Ex. Sess., ch. 249, § 9A.92.010 (214) (repealing former Wash. Rev. Code § 9.80.020, which was originally enacted by Washington Laws of 1909, ch. 249, § 134).

> two years. Thus no attempted suicide crime is defined by this [proposed] code."[9]

In 1991, Washington's voters rejected Initiative 119, which, had it passed, would have authorized a form of physician aid in dying.[10] Its enactment also would have presumably created an implied exception to the crime of promoting or aiding a suicide, at least for conduct explicitly authorized by the initiative. The initiative did not expressly amend or repeal the assisted suicide statute at issue here.

Almost all other States also prohibit assisting a suicide, either by statutes or by case law.[11] These statutes—generally considered part of the States' homicide laws—have been recognized by this Court as evidencing the States' interest in protecting and preserving human life.[12]

[9] Legislative Council's Judiciary Committee, *Report on the Revised Washington Criminal Code* 153 (December 3, 1970).

[10] A copy of the initiative is found in the appendix at pages H-1 to H-10. The initiative was prepared in standard legislative drafting form, reflecting changes in the existing statutory language by underlining language to be added and striking language to be deleted, enclosing the latter in double parentheses.

[11] In his dissent from the *en banc* panel decision, Judge Beezer catalogued forty-four States that condemn assisted suicide. *See* App. at A-135 to A-136, n.10-13. The list is extensive, but not exhaustive, because States are continuing to grapple with the issue. Judge Beezer's list does not include, for example, the 1995 Louisiana statute prohibiting "criminal assistance to suicide". *See* La. Rev. Stat. § 14:32.12 (as amended by Louisiana Acts of 1995, No. 384, § 1. It should also be noted that the Model Penal Code includes a prohibition against aiding suicide. Model Penal Code § 210.5.

[12] *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 280 (1990).

2. The Proceedings Below

a. The District Court Opinion

On cross motions for partial summary judgment, the District Court held that "a competent, terminally ill adult has a constitutionally guaranteed right under the Fourteenth Amendment to commit physician-assisted suicide."[13] Finding that Washington's statute prohibiting assisted suicide places an "undue burden" on the exercise of that right, the District Court concluded that the statute violates the Due Process Clause of the Fourteenth Amendment.[14]

The District Court also held that persons who depend on life support systems to remain alive are situated similarly to those who are terminally ill but able to continue living without life support, and that the refusal or withdrawal of life support by the former is "equivalent" to assisted suicide.[15] The District Court concluded that by allowing withdrawal or withholding life support, but prohibiting assisted suicide, Washington law violates the Equal Protection Clause as well.[16] Based on these conclusions, the District Court declared the statute unconstitutional.[17]

The District Court granted final judgment declaring the statute invalid pursuant to Fed. R. Civ. P. 54(b) and 28 U.S.C. § 2201, addressing only the claims of the patient

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[13] App. at E-16 (footnote omitted).

[14] App. at E-24.

[15] App. at E-28.

[16] *Id.*

[17] App. at E-28 to E-29.

plaintiffs and those advanced on their behalf by the physician plaintiffs.[18] The District Court did not reach the claims of the nonprofit corporation, nor the claims of the physicians on their own behalf, as they were not argued to the District Court.[19] The District Court declined to grant injunctive relief.[20]

b. The Court Of Appeals Panel Decision

Petitioners appealed to the Court of Appeals pursuant to 28 U.S.C. § 1291. A majority of a three judge panel of the Court of Appeals reversed the District Court, finding that the "decision of the district court lacks foundation in recent precedent [and] in the traditions of our nation."[21] Even assuming the existence of a liberty interest, the panel recognized several State interests furthered by the statute and concluded that "Washington's interests . . . individually and convergently, outweigh any alleged liberty of suicide."[22]

Rejecting the District Court's equal protection analysis, the panel also held that "plaintiffs have not sustained [their] burden"[23] of demonstrating that there is no rational basis for Washington's statutory distinction

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[18] App. at I-1 to I-3.

[19] App. at E-28.

[20] App. at E-29.

[21] *Compassion in Dying* I, App. at D-13.

[22] App. at D-14.

[23] App. at D-19.

"between actions taking life and actions by which life is not supported."[24] Senior Judge Wright dissented.[25]

c. ***En Banc* Review**

Respondents' suggestion for *en banc* review was granted[26] and a limited *en banc* panel was convened pursuant to 28 U.S.C. § 46(c) and Ninth Circuit Rule 35-3. Following oral argument, a majority of the *en banc* panel "clarified" the scope of the District Court opinion and then affirmed.[27] Rather than declaring the entire statute invalid, the *en banc* panel held that the "or aids" portion of the Washington statute violates the Due Process Clause when applied to the prescription of medications to assist adult persons who are mentally competent and terminally ill in committing suicide.[28]

Three judges dissented. Judge Beezer concluded that mentally competent, terminally ill adults have a liberty interest in committing physician-assisted suicide, but that the State's interests "are sufficiently strong to sustain the constitutionality of RCW 9A.36.060 as applied to plaintiff's asserted liberty interest."[29] Judges Fernandez and Kleinfeld, in separate opinions, concurred with Judge

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[24] App. at D-18.

[25] App. at D-20 to D-27.

[26] *Compassion in Dying v. Washington*, 62 F.3d 299 (9th Cir. 1995).

[27] *Compassion in Dying* II, App. at A-19.

[28] App. at A-19 to A-20.

[29] App. at A-160.

Beezer, but added that they found no constitutionally protected interest in committing suicide.[30]

d. **Post-Decision Proceedings**

The Court of Appeals' *sua sponte* suggestion for rehearing before the full court failed to receive a majority of the votes of the non-recused active judges of the Ninth Circuit.[31] Pursuant to orders of this Court, the Ninth Circuit's mandate has been stayed pending disposition of this petition.[32]

REASONS FOR GRANTING THE PETITION

Petitioners agree with the opening two sentences of the *en banc* panel opinion:

> "This case raises an extraordinarily important and difficult issue. It compels us to address questions to which there are no easy or simple answers, at law or otherwise."[33]

Citing such diverse authorities as Plato,[34] Shakespeare,[35] and the Harris Poll,[36] a majority of the

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[30] App. at A-160 (Fernandez, J., dissenting); A-161 to A-164 (Kleinfeld, J., dissenting).

[31] App. at C-1.

[32] App. at K-1 to K-2.

[33] App. at A-3.

[34] App. at A-41.

[35] App. at A-75.

[36] App. at A-48 to A-49.

Ninth Circuit *en banc* panel held that mentally competent, terminally ill adult patients have interests protected under the Due Process Clause of the Fourteenth Amendment and that these interests include a liberty interest in obtaining physician assistance in ending their lives.

At first blush, the Ninth Circuit appears to have narrowed the scope of the District Court's decision. Rather than declaring the entire statute invalid, the ruling by its terms applies only to the "or aids" provision, and then only to circumstances involving physician prescription of medications for terminally ill patients.[37]

On closer reading, however, it becomes clear that the Ninth Circuit ruling is in many respects much broader than that of the District Court. Thus, not only does it apply to physicians, but also to other health care workers, family members, and friends.[38] Though the purported liberty interest is described in terms of avoiding pain, the *en banc* panel suggests that the desire to avoid medical bills may be sufficient to implicate constitutional protection.[39] Nor is the Ninth Circuit decision limited to those who are mentally competent: "[A] decision of a duly appointed surrogate decision maker is for all legal purposes the decision of the patient himself."[40] Finally, the Ninth Circuit decision telegraphs the possibility that in future cases the "right to die" may expand to "other forms of life-

[37] App. at A-19 to A-20.

[38] App. at A-116, n.140.

[39] App. at A-87.

[40] App. at A-100 to A-101, n.120.

ending medical assistance, such as the administration of drugs by a physician"—i.e., active euthanasia.[41]

1. The Ninth Circuit's Opinion Conflicts With Established Supreme Court Jurisprudence

The Supreme Court has historically found constitutional protection to apply to those liberties "'implicit in the concept of ordered liberty [such that] neither liberty nor justice would exist if [they] were sacrificed.'"[42] In an alternative formulation, this Court described interests entitled to constitutional protection as those that are "deeply rooted in this Nation's history and tradition."[43]

In deciding whether particular conduct is constitutionally protected, this Court has looked not to broad categories of activities, or even to the ends the activities seek to accomplish, but rather to the specific conduct at issue in the case before the Court. As the Court has recently cautioned, "'[s]ubstantive due process' analysis must begin with a careful description of the asserted right".[44]

[41] App. at A-100; *see also* A-30, n.15 ("The constitutionality of prohibiting physicians from administering life-ending drugs to terminally ill persons is not before us.").

[42] *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

[43] *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

[44] *Reno v. Flores*, 507 U.S. 292, 302 (1993) (*citing Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)).

Thus, for example, this Court has concluded that marriage[45] and the use of contraceptives[46] are constitutionally protected. These are but two means toward the end of controlling the makeup of one's family. But other means to that end—polygamy and infanticide, for example—are not the subject of constitutional protection.

Similarly, liberty interests in refusing unwanted medical treatment[47] or having access to abortion services[48] have not been transformed to a broader liberty interest in controlling all activities affecting one's body,[49] an end that could include prostitution and recreational drug use.

Disregarding this cautionary approach, the Ninth Circuit majority took the opposite approach. Its inquiry was not limited to the more narrow issue before it—whether there is a liberty interest in committing suicide that includes assistance in doing so. Instead, the Ninth Circuit addressed the broader question of "whether there is a liberty interest in determining the time and manner of one's death," or "the right to die."[50] As Judge Reinhardt,

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[45] *Turner v. Safely*, 482 U.S. 78 (1987).

[46] *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

[47] *See, e.g., Washington v. Harper*, 494 U.S. 210 (1990).

[48] *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

[49] The *Roe* Court declined an invitation to rule "that one has an unlimited right to do with one's body as one pleases." *Roe*, 410 U.S. at 154.

[50] App. at A-27.

writing for the majority, explained: "[I]t is the end and not the means that defines the liberty interest."[51]

The Ninth Circuit's conclusion departed from this Court's jurisprudence by selectively reading fragments of the *Cruzan* and *Casey* decisions without reference to their holdings or the larger context in which they were decided. It then compounded its error by applying the wrong test.

a. *Cruzan*

In *Cruzan v. Missouri Department of Health*,[52] this Court considered whether there were constitutional limitations on the procedural requirements a State could impose prior to granting a request that artificial life support be withdrawn from a comatose patient who had no hope of recovery.

The *Cruzan* Court acknowledged that its prior decisions recognized a liberty interest in refusing unwanted medical treatment.[53] The Court further assumed, but specifically did not decide, that withdrawal of mechanically administered nutrition and hydration was encompassed within such a liberty interest.[54]

The *Cruzan* Court then held that Missouri's imposition of procedural safeguards to assure that such a

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[51] *Id.*

[52] *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261 (1990).

[53] *Cruzan*, 497 U.S. at 278 (1990). Given that providing unwanted medical treatment without consent was a tort at the common law, it is difficult to argue that such a liberty interest is not "deeply rooted in this Nation's history and traditions". *Moore*, 431 U.S. at 503.

[54] *Cruzan*, 497 U.S. at 279.

decision was made voluntarily did not violate the Fourteenth Amendment.[55] Such procedural safeguards were justified on the basis of at least two important State interests—preserving life, and protecting against undue influence or abuse.[56]

With respect to the State's interest in preserving life, the *Cruzan* Court noted that:

> "As a general matter, the States—indeed, all civilized nations—demonstrate their commitment to life by treating homicide as a serious crime. Moreover, the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide."[57]

The *Cruzan* Court rejected the notion that a State's interest in protecting and preserving an individual's life varies proportionately to the quality of that life:

> "[A] State may properly decline to make judgments about the "quality" of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life[.]"[58]

The Ninth Circuit turned *Cruzan* on its head. Even though the *Cruzan* Court only *assumed* a liberty interest in refusing artificial food and hydration, the *en banc* panel

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[55] *Id.* at 283.

[56] *Id.* at 280.

[57] *Id.* at 280.

[58] *Id.* at 282.

concluded that *Cruzan* "necessarily recognizes a liberty interest in hastening one's own death."[59]

The Ninth Circuit opinion acknowledged the *Cruzan* Court's admonition that "the state's interest in preserving life may be unqualified, and may be asserted regardless of the quality of the life or lives at issue."[60] But it nonetheless concluded that the "*strength* [of the state's interest] is dependent on relevant circumstances, including the medical condition . . . of the person whose life is at stake."[61]

The *en banc* panel majority does not disclose how, under its formulation, a State legislature is to assess the *strength* of the State's interest in protecting life in individual situations without making "judgments about the 'quality' of life that a particular individual may enjoy"[62]—precisely the judgments that the *Cruzan* Court said a State is not required to make.

Finally, the Ninth Circuit decision converted *Cruzan*'s approval of a State's procedural safeguards surrounding end of life decisions to a purported holding that "the state could not prohibit" such decisions altogether.[63] Regardless of how this Court might decide that question—were it presented—nothing in the *Cruzan* opinion suggests that it was presented or answered in the

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[59] App. at A-62 (footnote omitted).

[60] App. at A-65 (citing *Cruzan*).

[61] *Id.* (emphasis in original).

[62] *Cruzan*, 497 U.S. at 282.

[63] App. at A-59, n.67; *see also* A-104.

Cruzan case. This conversion of what "may" be done into what "must" be done is precisely the kind of sophistry that this Court criticized in *Cruzan*.[64]

b. *Casey*

The Ninth Circuit also misapplied this Court's holding in *Planned Parenthood v. Casey*.[65] The issue in that case was whether to narrow or overturn the holding in *Roe v. Wade*[66] that a woman's decision to terminate a pregnancy was constitutionally protected. In *Casey*, a majority of the Court concluded that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed."[67]

The Ninth Circuit decision below expanded the *Casey* holding into a reformulation of the standard by which the existence of constitutionally protected liberty interests are to be determined. It read introductory language describing a category of previously recognized liberty interests as a pronouncement that any activities

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[64] Two prior Supreme Court decisions held that a State may require that parents make certain decisions on behalf of their minor children. Apparently, Ms. Cruzan's parents contended that these decisions stood for the proposition that a State must recognize parental decisionmaking. The *Cruzan* Court noted that "petitioners would seek to turn a decision which allowed a State to rely on family decisionmaking into a constitutional requirement that the State recognize such decisionmaking. But constitutional law does not work that way." *Cruzan*, 497 U.S. at 286.

[65] 505 U.S. 833 (1992).

[66] 410 U.S. 113 (1973).

[67] *Casey*, 505 U.S. at 846.

falling within the grammatical construct of this categorization is now subject to constitutional protection.[68]

Such a reading ignores the context in which *Casey* was decided, its solid grounding in the doctrine of *stare decisis*, and the following explicit language in Justice O'Connor's opinion:

> "Abortion is a *unique* act. [In the abortion context] the liberty of the woman is at stake in a sense unique to the human condition and so *unique* to the law."[69]

c. The Appropriate Test

The Ninth Circuit *en banc* panel expressly held that the "'or aids' provision of [the] Washington statute . . . is unconstitutional *as applied* to terminally ill competent adults who wish to hasten their deaths with medication prescribed by their physician."[70]

By attempting to limit its holding to a single category of those subject to the statute, the Ninth Circuit finessed the test announced in *United States v. Salerno*[71] for determining facial[72] challenges to statutes under the

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[68] *See generally*, App. at A-54 to A-58.

[69] *Casey*, 505 U.S. at 852 (emphasis added).

[70] App. at A-113 to A-114 (emphasis added). As noted above at pages 10-11, the import of the decision may be much broader.

[71] 481 U.S. 739 (1987).

[72] The District Court analyzed Respondents' complaint as challenging the statute on its face. App at E-16 to E-20. On appeal, Respondents re-framed their challenge, attacking the statute "as applied" to the group for whom they advocate. Both they and the

Due Process Clause, i.e., whether there is "no set of circumstances . . . under which the Act would be valid."[73] The *Salerno* Court pointed out that "we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment."[74]

The Ninth Circuit attempted to defend its approach by acknowledging that "[d]eclaring a statute unconstitutional as applied to members of a group is atypical but not uncommon."[75] However, the two cases it cites do not support this proposition. The first[76] involved a statute purporting to authorize government conduct that violated the Fourth Amendment. It was the conduct, and not the statute, that was at issue. The second[77] was a First Amendment case; its holding clearly was consistent with the "overbreadth" doctrine recognized by the *Salerno* Court as an exception to the general rule.

The Ninth Circuit instead applied its own version of a balancing test, relying on *Cruzan* and two cases cited by

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Ninth Circuit appear to agree that the statute serves legitimate State interests in all other circumstances to which it applies—i.e., situations involving those who are mentally or emotionally disturbed, those not terminally ill (however defined), and those who, though mentally competent and terminally ill, wish to live.

[73] *Salerno*, 481 U.S. at 745.

[74] *Id.*

[75] App. at A-20, n.9.

[76] *Tennessee v. Garner*, 471 U.S. 1 (1985).

[77] *Wisconsin v. Yoder*, 460 U.S. 205 (1972).

the *Cruzan* Court.[78] All three of these cases involved the application of State law to particular fact situations involving identified individuals.

At issue in the instant case is a legislative judgment about the appropriate scope of the Washington enactment, not its application to particular individuals. Labeling this case as involving a challenge to the statute "as applied" is a misnomer.

State legislatures must have the discretion to assess the needs of various segments of their respective populaces, balance competing interests, and craft legislation that reflects that balance, so long as the enactment serves a legitimate purpose as to at least some of those to whom it is addressed.

It is the essential nature of this legislative process that the interests of some are subordinated to further what the legislature deems to be a greater benefit to others or to society as a whole. As this Court has recently noted:

> "Even laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons."[79]

Application of the *Salerno* rule to cases such as this—regardless of the label applied to them—allows States to continue this essential legislative function, so long as the choices they make further legitimate State interest in at

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[78] *Youngberg v. Romeo*, 457 U.S. 307 (1982), and *Mills v. Rogers*, 457 U.S. 291 (1982), cited in *Cruzan*, 497 U.S. at 279.

[79] *Romer v. Evans*, ___ U.S. ___, 116 S. Ct. 1620, 1628 (1996).

least some of the circumstances to which they are addressed.

This Court should grant certiorari to correct the Ninth Circuit's erroneous reading of its prior decisions and to give guidance as to the appropriate test to be applied when statutes of general application are challenged under the Due Process Clause.

2. The Ninth Circuit Due Process Conclusion Conflicts With Those Of Other Appellate Courts That Have Considered The Issue

The Ninth Circuit is the only appellate court in this or any other country[80] to hold that a statute prohibiting assisted suicide violates the Due Process Clause. It stands in conflict with decisions of State appellate courts in Michigan and California, and with a recent decision of the Second Circuit.

The Michigan Supreme Court, in a series of related cases involving the well-known Dr. Kevorkian,[81] affirmed the Michigan Court of Appeals in rejecting the argument that a State ban on assisted suicide violates the Due Process Clause:

> "[T]he right to commit suicide is neither implicit in the concept of ordered liberty nor deeply rooted in this nation's history and

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[80] The Supreme Court of Canada has rejected a claim that section 7 of the Canadian Charter of Rights and Freedoms, a provision that parallels the Due Process Clause, mandates allowing assisted suicide. *Rodriguez v. British Columbia (Attorney General)*, 3 S.C.R. 519 (1993).

[81] For a detailed account of the activities of Dr. Kevorkian—the so-called suicide doctor—see Michael Betzold, *Appointment With Dr. Death* (1993).

> tradition. It would be an impermissibly radical departure from existing tradition, and from the principles that underlie that tradition, to declare that there is such a fundamental right protected by the Due Process Clause."[82]

This Court denied certiorari.[83] The California Court of Appeals has also rejected the notion that the Due Process Clause protects a liberty interest in assisted suicide.[84]

The most recent appellate court in this country to consider the issue is the Second Circuit Court of Appeals, which also declined to find that a State prohibition against assisted suicide violates the Due Process Clause.[85]

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[82] *People v. Kevorkian*, 447 Mich. 436, 481, 527 N.W.2d 714 (1994). The Michigan Supreme Court reversed the holding of the Michigan Court of Appeals that the statute at issue had been enacted in violation of procedural requirements of the Michigan Constitution, but upheld the Court of Appeals' alternative holding that the statute did not violate the Due Process Clause. *See Hobbins v. Attorney General*, 205 Mich. App. 194, 518 N.W.2d 487 (1994).

[83] *Kevorkian v. Michigan*, 115 S. Ct. 1795 (1995).

[84] "In the case of assisted suicides, however, the state has an important interest to ensure that people are not influenced to kill themselves. The state's interest must prevail over the individual because of the difficulty, if not the impossibility, of evaluating the motives of the assister or determining the presence of undue influence."

Donaldson v. Lundgren, 4 Cal. Rptr. 2d 59, 64, 2 Cal. App. 4th 1614 (Cal. App. 2d Dist. 1992).

[85] *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996) (Petition for Certiorari pending). The *Quill* court's holding that New York statutes similar to Washington's violate the Equal Protection Clause is discussed below.

> "The right to assisted suicide finds no cognizable basis in the Constitution's language or design, even in the very limited cases of those competent persons who, in the final stages of terminal illness, seek the right to hasten death."[86]

In short, the Ninth Circuit is the *only* appellate court to conclude that a statute prohibiting assisting a suicide violates the Due Process Clause.

This Court should grant certiorari to resolve the conflict created by the erroneous decision below.

3. The Equal Protection Clause Does Not Support The Conclusion Reached Below

The District Court advanced the Due Process Clause and the Equal Protection Clause as alternative bases for concluding that the Washington statute is unconstitutional.[87] The panel decision rejected both.[88]

The Ninth Circuit *en banc* panel, having concluded that the statute violates the Due Process Clause, ostensibly did not consider the equal protection prong of the District Court's analysis.[89]

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[86] *Id.* at 724-25.

[87] App. at E-28.

[88] *Compassion in Dying* I, App. at D-18 to D-19.

[89] App. at A-115. Even though not relied on by the *en banc* panel, Respondents' equal protection arguments are properly considered in connection with this Petition For Certiorari as Respondents "may legitimately defend their judgment on any ground properly raised below." *Reno*, 507 U.S. at 300, n.3 (1993).

A closer reading of the opinion below reveals, however, that equal protection principles played an integral part in its due process analysis. This is most apparent in the *en banc* panel's assessment of the strength of Washington's interest in enforcing the statute in individual situations involving the terminally ill. That analysis is based largely on the existence of Washington's Natural Death Act,[90] a statute authorizing the withholding or withdrawing of life support from terminally ill persons in some circumstances. According to the Ninth Circuit majority:

> "In adopting the statute, the Washington legislature necessarily determined that the state's interest in preserving life is not so weighty that it ought to thwart the informed desire of a terminally ill, competent adult to refuse medical care."[91]

The court then proceeded from this premise to a conclusion that Washington's interests in prohibiting assisted suicide were equally weak:

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[90] Wash. Rev. Code §§ 70.122.010-.120.

[91] App. at A-66. The Ninth Circuit majority did not explain why the Natural Death Act could not simply be viewed as a legislative choice among many competing interests in the difficult circumstances to which the Natural Death Act is addressed. Nor did the majority explain how its assessment of legislative intent could be squared with the following explicit language from the Natural Death Act:

> Nothing in this chapter shall be construed to condone, authorize, or approve mercy killing, or to permit any affirmative or deliberate act or omission to end life other than to permit the natural process of dying.

Wash. Rev. Code § 70.122.100.

> "[W]e see no ethical or constitutionally cognizable difference between a doctor's pulling the plug on a respirator and his prescribing drugs which will permit a terminally ill patient to end his own life. . . . [W]e find the state's interests in preventing suicide do not make its interests substantially stronger here than in cases involving other forms of death-hastening medical intervention. To the extent that a difference exists, we conclude that it is one of degree and not of kind."[92]

The equal protection analysis implicit in the Ninth Circuit's conclusion was explicitly the basis for the Second Circuit's recent decision that two New York laws substantially similar to the Washington statute were invalid.[93] According to the Second Circuit, "New York does not treat similarly circumstanced persons alike"[94] and the distinction is "not rationally related to any legitimate state interest."[95]

This conclusion was predicated on the same two flawed premises underlying the District Court's equal protection analysis in the instant case—that persons who depend on life support systems to remain alive are situated similarly to those who are able to eat, drink, and breathe

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[92] App. at A-82.

[93] *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996) (Petition For Certiorari pending).

[94] *Id.* at 729.

[95] *Id.* at 731.

on their own; and that refusing or withdrawing life support by the former is "equivalent" to assisted suicide.[96]

Other courts that have addressed the issue of withholding or withdrawing life-sustaining treatment, including artificial hydration and nutrition, have reached the opposite conclusion. Most of these cases recognized the difference between refusing unwanted medical treatment and suicide, the act of refusing life itself.[97]

Consider the following examples:

The Washington State Supreme Court:

> "We emphasize that we are not endorsing suicide or euthanasia."[98]

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[96] App. at E-18. The District Court's analysis was also predicated on the erroneous proposition that the "strict scrutiny" test applied to the statute. App. at E-25. The *Quill* Court recognized, correctly, that statutes not implicating fundamental rights or involving suspect classifications are to be overturned only if there is no rational basis for the statutory classification. *Quill*, 80 F.3d at 727.

[97] *See, e.g., Rasmussen v. Fleming*, 154 Ariz. 207, 218, 741 P.2d 674 (1987); *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 1144, 225 Cal. Rptr. 297 (1986); *Bartling v. Superior Court of Los Angeles (Glendale Adventist Med. Ctr.)*, 163 Cal. App. 3d 186, 196, 209 Cal. Rptr. 220 (1984); *Foody v. Manchester Memorial Hosp.*, 482 A.2d 713, 720 (Conn. Super. Ct. 1984); *Staz v. Perlmutter*, 362 So. 2d 160, 162-63 (Fla. Dist. Ct. App. 1978); *State v. McAfee*, 259 Ga. 579, 385 S.E.2d 651, 652 (1989); *In re Gardner*, 534 A.2d 947, 955-56 (Me. 1987); *Brophy v. New England Sinai Hosp., Inc.*, 398 Mass. 417, 497 N.E.2d 626, 638 (1986); *Matter of Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976); *Matter of Farrell*, 108 N.J. 335, 529 A.2d 404, 411 (1987); *Matter of Storar*, 52 N.Y.2d 363, 438 N.Y.S.2d 266, 273, 420 N.E.2d 64, 71, n.6 (1981); *Leach v. Akron Gen. Med. Ctr.*, 68 Ohio Misc. 1, 426 N.E.2d 809, 815 (1980); *In re Grant*, 109 Wn.2d 545, 563, 747 P.2d 445 (1987).

[98] *In re Grant*, 109 Wn.2d at 563.

The New Jersey Supreme Court:

> "We would see, however, a real distinction between the self-infliction of deadly harm [suicide] and a self-determination against artificial life support . . . ."[99]

The Arizona Supreme Court:

> "Asserting the right to refuse medical treatment is not tantamount to committing suicide."[100]

The Maine Supreme Court :

> "[A patient's] decision not to receive [medical procedures], far from constituting suicide, is a choice to allow to take its course the natural dying process set in motion by his physiological inability to chew or swallow."[101]

In short, the equal protection analysis that is explicit in *Quill* and implicit in the *en banc* panel decision is at odds with virtually every appellate court decision addressing end of life issues.

4. This Case Presents Important Issues Of Public Policy And Federalism

This case is important because its subject matter—physician assisted suicide—is hotly debated in

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[99] *In the Matter of Quinlan*, 355 A.2d at 665.

[100] *Rasmussen v. Fleming*, 154 Ariz. at 218.

[101] *In re Gardner*, 534 A.2d at 955-56 (citations omitted).

hospital corridors and legislative halls across the nation. A constitutional "right to die"—if it exists—has implications for every American.

Two States—Michigan and New York—have commissioned studies of the assisted suicide issue, each producing thoughtful analyses of the complex set of medical, philosophical, ethical, social, and legal interests that the subject evokes.[102] The fact that these analyses arrived at opposite conclusions evidences the complexity of the issue.

But this case has implications far beyond the subject of assisted suicide. The Ninth Circuit's reasoning, if allowed to stand, portends a substantially redefined relationship between the federal judiciary and the States, whose legislatures have historically been viewed as the appropriate venue in a democratic society for resolving important issues of social policy.

This Court has repeatedly cautioned that federal judicial review of State legislation under the Fourteenth Amendment is limited to assuring that it is rationally related to legitimate State interests.[103] As this Court recently noted:

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[102] The New York State Task Force On Life And The Law, *When Death Is Sought: Assisted Suicide And Euthanasia In The Medical Context* (1994); The Michigan Commission On Death And Dying, *Final Report* (1994).

[103] *See, e.g., Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955); *Ferguson v. Skrupa*, 372 U.S. 726 (1963) ("The [state] statute may be wise or unwise. But relief, if any be needed, lies not with us but in the body constituted to pass laws for the State . . .", 372 U.S. at 732).

> "The Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended."[104]

This restrained jurisprudential approach gives the States latitude to craft legislation that balances the various competing interests affected by a particular issue.

The Ninth Circuit opinion, if allowed to stand, trumpets a substantially more intrusive role for federal courts in reviewing State legislation. Under its approach, State statutes that impose general rules that rationally advance legitimate State interests across a continuum of conduct will not stand. Rather, under the Ninth Circuit's construct, federal courts must examine each application of a State statute and determine whether the State's interest in that particular application is sufficiently strong to outweigh other interests that may be involved. Such balancing of interests, we are told, "is quintessentially a judicial role . . . no legislative body can perform the task."[105]

The question of whether some form of physician assisted suicide should be allowed is a controversial issue of social policy implicating a wide range of interests. The Ninth Circuit decision not only purports to find a constitutionally compelled resolution of that issue, it does so in a manner that significantly enlarges the role of the federal judiciary in resolving other such issues. For both of these reasons, this is a case of exceptional importance, warranting review by this Court.

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[104] *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992).

[105] App. at A-111.

CONCLUSION

In addressing an important issue of social policy, the Ninth Circuit has departed from the traditional approach adopted by this Court and misapplied this Court's prior holdings, creating an expansive and intrusive role for the federal judiciary in reviewing State statutes. Its explicit due process holding conflicts with that of every other appellate court that has considered the issue, and its implicit equal protection decision suffers from the same flaw as that of the only other appellate court to reach the same conclusion.

For all these reasons, this Court should grant the Petition for Writ of Certiorari and reverse the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted this 3rd day of July, 1996.

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